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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**

7 UNITED STATES OF AMERICA

Case No.11-CR-5782

8 Plaintiff,
9 vs.

**ORDER DENYING MOTION TO
DISMISS INDICTMENT**

10 JOSE ARMANDO ZAVALA-ZAVALA,
11 Defendant.
12

Docket No. 13

13 Defendant Jose Armando Zavala-Zavala was indicted on December 21, 2011 of
14 violations of 8 U.S.C. §1325 and §1326(a). He now moves to dismiss the indictment based on
15 purported flaws in his deportation hearing. For the reasons stated below, the motion is DENIED.

16 **I. BACKGROUND**

17 Defendant was arrested in October 2011 near the Calexico port of entry. He admitted
18 that he had no papers allowing him to legally enter the United States. The government's records
19 show that Defendant was deported from the United States to Mexico on September 11, 2006, and
20 that before the 2006 deportation Defendant had been apprehended in the United States and sent
21 back to Mexico twenty-five times.

22 Defendant's motion is based solely on the alleged failure of the immigration judge ("IJ")
23 to properly inform Defendant of his right to apply for voluntary departure. At the deportation
24 hearing, Defendant admitted the government's allegations. Transcript, U.S. Ex. 6 ("Tr.") at 10.
25 The IJ explained to all defendants that they might be eligible for a remedy that could allow them

1 to avoid removal such as voluntary departure, asylum, adjustment of status, and cancellation of
2 removal. Tr. at 3. He stated: “If you are eligible for any relief or remedy I will tell you and give
3 you the chance to apply for it.” Id.

4 The IJ asked Defendant whether he was the son of a U.S. citizen, if he had ever had
5 immigration documents, if anyone had ever applied to immigrate him, if he had ever lived in the
6 United States, or if he had family in the U.S. He answered “no” to all of the questions. Tr. at 9-
7 10. He also stated that he was not afraid of persecution in Mexico and that he had never been to
8 jail or prison. Tr. at 11. Soon after, the IJ asked if there was anything else he “ought to know,”
9 and Defendant once again said “no.” Tr. at 13. Next, the IJ said:

10 You do appear to be eligible for voluntary departure, but you had it, well [sic] say
11 functional equivalent, twenty-five times and violated everyone [sic] of them. So I
12 will deny voluntary departure as a matter of discretion. And I’ll order you
removed to Mexico the country you chose. But you do not have to accept my
decision. You can appeal. Do you want to appeal?

13 Again, Defendant answered “no,” even after learning that declining to appeal would
14 mean that the IJ’s decision was final. Tr. at 13.

15 **II. LEGAL STANDARD AND DISCUSSION**

16 To collaterally attack a deportation under §1326(d), a defendant must demonstrate that
17 (1) he exhausted all administrative remedies that may have been available to seek relief against
18 the order; (2) the deportation proceedings at which the order was issued improperly deprived him
19 of the opportunity for judicial review; and that (3) the entry of the order was fundamentally
20 unfair. 8 U.S.C. §1326(d). The underlying order will be found fundamentally unfair only if (1)
21 the defendant’s due process rights were violated by defects in the deportation proceeding, and (2)
22 he suffered prejudice as a result of those defects. United States v. Ubaldo-Figueroa, 364 F.3d
23 1042, 1048 (9th Cir. 2004). Defendant argues that he meets this standard because the IJ failed to
24 allow him to apply for voluntary departure.

1 Ninth Circuit case law makes clear that defendants in immigration proceedings have due
2 process rights to receive information concerning the right to apply for voluntary departure.
3 United States v. Melendez-Castro, 671 F.3d 950 (9th Cir. 2012). The Melendez-Castro court
4 explained that “[t]he Due Process Clause of the Fifth Amendment requires that an alien in
5 immigration proceedings be ‘made aware that he has a right to seek relief.’” Id. at 954 (citations
6 omitted).

7 **A. Due Process Violation**

8 Because the existence of a due process right has been established, the court must
9 determine whether Defendant’s due process rights were violated by the IJ. Melendez-Castro
10 stated that the due process right in this situation “includes providing an alien with the
11 opportunity to apply for relief. An alien applying for such relief has a right to present evidence
12 in support of the claim.” Id. Defendant argues that because the IJ failed to advise him of his
13 right and thus did not give him the opportunity to support his claim with evidence, his rights
14 were violated.

15 In support, Defendant points to the facts of Melendez-Castro. In that case, the defendant
16 faced prosecution under 8 U.S.C. § 1326 after having been deported. During the deportation
17 hearing, the IJ only summarily explained voluntary departure and stated that he would not grant
18 it to the defendant because he had a personal policy against granting voluntary departure to
19 anyone convicted of a crime in the United States. Based on this, the court found that Melendez-
20 Castro “never had a genuine opportunity to apply for voluntary departure or present evidence of
21 the factors favoring this relief.” Id.

22 Similarly, Defendant in this case had no opportunity to apply for voluntary departure or
23 present evidence of factors favoring relief. While the IJ explained that voluntary departure relief
24 exists, he did not explain in detail the consequences of being granted voluntary departure, instead
25 merely stating to all defendants simultaneously that all of the forms of relief “would allow you to

1 avoid being removed.” Tr. at 3. And while the IJ appeared to consider whether to grant
2 voluntary departure to Defendant, he did not clearly inform Defendant of how he might apply for
3 the discretionary relief or present evidence in his favor. Instead, he asked him a line of questions
4 (presumably in order to help make the voluntary departure decision), and then stated that the
5 relief would be denied. While the IJ in this case may have considered more factors than the IJ in
6 Melendez-Castro, he nevertheless failed to give Defendant a meaningful opportunity to apply for
7 the relief or present evidence. Like Melendez-Castro, Defendant here “would have been
8 discouraged from applying for voluntary departure to an extent that it is as if he was told that he
9 did not qualify for relief.” 671 F.3d at 954. Further, the “IJ never asked [Defendant] whether he
10 wanted to apply and, instead, said that any such application would be futile.” Id.

11 The United States attempts to distinguish Melendez-Castro in several ways. First, it
12 states that instead of summarily discussing voluntary departure, the IJ here “informed the group
13 about the various forms of relief, including voluntary departure.” It is unclear how the
14 government believes that the IJ here provided more information than Melendez-Castro—he
15 merely stated that there were various forms of relief, listed them, and then told the group that he
16 would inform them if they were eligible for any form of relief and give them the chance to apply
17 for it. Tr. at 3. It is true that when speaking with a different defendant, the IJ stated that he
18 would “weigh all the good against all the bad to determine whether to grant voluntary departure.”
19 Tr. at 8. However, the government has not attempted to explain why Defendant should be bound
20 by a statement made to another defendant at the removal proceeding. It also provides no reason
21 as to why simply announcing that voluntary departure requires weighing good against bad is a
22 sufficient explanation.

23 Second, the United States maintains that “the IJ in this case did give Defendant an
24 opportunity to apply for voluntary departure by asking” questions relevant to whether
25 discretionary voluntary departure should be granted. U.S. Opp. at 10. The government then

1 points out that “[i]t was after these questions were answered that the IJ told Defendant that he
2 appeared eligible for voluntary departure,” (emphasis in original) but denied relief because of the
3 twenty-five incidents in which Defendant had been found in the United States. This argument is
4 unpersuasive. While the questions asked by the IJ may demonstrate that he considered some
5 appropriate factors for the voluntary departure analysis, it does not change the fact that the IJ
6 never provided Defendant with an opportunity to apply for relief or present evidence or argument
7 on his behalf. And contrary to the government’s implication, the fact that the IJ only told
8 Defendant about his eligibility for voluntary departure after he asked the set of questions makes
9 it more likely that Defendant was unaware that the questions were being asked in order to
10 determine eligibility for voluntary departure. Because he lacked that awareness, he was likely to
11 be unprepared to answer the questions in a manner that would assist him with securing voluntary
12 departure.

13 **B. Prejudice**

14 To succeed, Defendant also must show that he was prejudiced by the due process failure.
15 To demonstrate prejudice, he “does not have to show that he actually would have been granted
16 relief,” only “that he had a ‘plausible’ ground for relief from deportation.” United States v.
17 Ubaldo-Figueroa, 364 F.3d 1042, 1050 (9th Cir. 2004). The United States attempts to show that
18 because the equities were not in Defendant’s favor, it was impossible that the IJ would have
19 granted him voluntary departure. The BIA has instructed IJs to consider:

20 the nature and underlying circumstances of the deportation ground at issue;
21 additional violations of the immigration laws; the existence, seriousness, and
22 recency of any criminal record; and other evidence of bad character or the
23 undesirability of the applicant as a permanent resident, [as well as positive factors
such as] long residence here, close family ties in the United States, or
humanitarian needs.

24 In re Arguelles-Campos, 22 I&N Dec. 811, 817 (BIA 1999).
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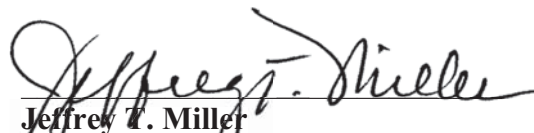
1 Defendant fails to demonstrate that relief was plausible. He has violated United States
2 immigration laws on at least twenty-five occasions, willfully ignoring warnings to stop crossing
3 the border illegally.¹ This weighs heavily against him, and he does not have sufficient positive
4 equities to outweigh these violations. He has not shown lengthy residence in the United States,
5 probably because he has so often been forced to return to Mexico. While he now mentions that
6 he has brothers in Stockton, California, he previously stated that his entire family was in Mexico,
7 demonstrating that any family ties he has in the United States are limited. Further, while his
8 financial support for his daughter is undoubtedly important, it represents a typical circumstance
9 for those illegally crossing the border and is simply not enough to outweigh his repeated illegal
10 border crossings.

11 **III. CONCLUSION**

12 As explained above, the court finds that Defendant's due process rights were violated, but
13 he was not prejudiced thereby. Consequently, the motion to dismiss the indictment is DENIED.

14 **IT IS SO ORDERED.**

15 DATED: June 1, 2012

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18 **Jeffrey T. Miller**
United States District Judge

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21 ¹ The government points to several cases in which IJs refused to grant voluntary departure in large
22 part because of repeated illegal entries into the United States. While these do not conclusively show that
23 relief would have been implausible, they provide some support for the United States' argument. In
24 Arguelles-Campos, 22 I&N Dec. at 819, the BIA upheld an IJ's decision denying relief for an alien that
25 "entered this country five times without inspection after being permitted to voluntarily depart five times"
and drove in the United States without a license, even though he lived with two U.S. citizen children,
volunteered at his church, and had no criminal convictions. In In re Teofilo Lopez-Corona, 2008 WL
2782957 (BIA 2008) (unpublished decision), the BIA upheld an IJ decision denying voluntary departure
seemingly solely because the defendant had been allowed to voluntarily return to Mexico six times before
his hearing.